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COURT OF APPEAL, FOURH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN PERRY MILES, Defendant and Appellant.	D075238 (Super. Ct. No. SCE362137)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz Lewis, Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana Cohen Butler and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jonathan Perry Miles of multiple sexual offenses against two different minors. True findings on the multiple victim allegation triggered mandatory sentencing under the One Strike Law (Pen. Code,

§ 667.61, subd. (b)), and Miles received an aggregate prison term of 45 years-to-life.[1]

Following Miles's appeal, appointed appellate counsel filed a brief pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*) and *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We granted Miles an opportunity to file a supplemental brief on his own behalf, but he did not do so. After independently reviewing the entire record (*People v. Kelly* (2006) 40 Cal.4th 106, 119), we find no arguable appellate issues and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Twenty-seven-year-old Miles lived in an apartment complex in Lemon Grove. Nine-year-old S.B. met him in 2006 while visiting her cousins K.M. and Chloe H., who lived at that complex. Being close with S.B.'s aunt and uncle, Miles would join family outings to the park and beach. Within weeks of their initial meeting, Miles began to molest S.B. In the years that followed, Miles touched S.B.'s vagina and breasts as they played hide-and-seek, watched movies, and hung out behind the community laundry. Every time they swam in the community pool, Miles would pull her bathing suit aside and either place his penis against S.B.'s vagina or penetrate her with his fingers. Although he usually touched her, Miles would sometimes place S.B.'s hand on his penis. On one occasion, S.B. claimed to have had sexual intercourse with Miles in his apartment. The touching stopped at age 13, when S.B. moved to Oregon with her father.

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1 Further statutory references are to the Penal Code. Section 667.61, subdivision (b) imposes a mandatory 15-years-to-life term for specified sexual offenses. Known as the "One Strike Law," it was triggered in this case because Miles was found to have committed lewd acts (§ 288, subd. (a)) against more than one victim. (See § 667.61, subds. (b), (c)(8), (e)(4).)

Twelve-year-old J.H. lived in the same Lemon Grove apartment complex with her mother, who dated Miles. One night, she fell asleep while watching a movie in bed with her mother and Miles. The next morning, her mother had left for the gym, and J.H. awoke to find Miles's hands inside her underwear, rubbing her vagina.

A third victim, K.M., claimed that Miles rubbed her vagina once while she was in kindergarten and orally copulated her when she was 11 years old. Although her testimony was consistent at the preliminary hearing and at trial, she stated in her initial forensic interview that Miles orally copulated her at age four.

The San Diego County District Attorney charged Miles with 10 sexual offenses against K.M., S.B., and J.H. between 2006 and 2014. Counts 1 and 2 alleged lewd conduct against K.M. when she was in kindergarten and 11 years old. (§ 288, subd. (a).) Counts 3 and 4 alleged two acts of sexual penetration of S.B. between 2006 and 2008, when S.B. was nine or 10. (§ 288.7, subd. (b).) Counts 5 through 8 alleged four instances of lewd conduct against S.B. between 2007 and 2010—specifically, touching her vagina twice with his penis and twice with his hand. (§ 288, subd. (a).) Count 9 alleged that between 2008 and 2010, Miles had sexual intercourse with S.B. (§ 288, subd. (a).) Finally, count 10 alleged that Miles engaged in lewd conduct against then-12-year-old J.H. between 2007 and 2008. (§ 288, subd. (a).) As to each of the lewd act charges (counts 1–2, 5–9, and 10), the amended information asserted that Miles had engaged in substantial sexual conduct with his victim (§ 1203.066, subd. (a)(8)) and that he had committed these offenses against more than one victim (§ 667.61, subds. (b), (c), (e)).

During trial, the People examined the victims and their relatives. Detective David Brannan of the San Diego County Sheriff's Department

described his investigation, including his collection of graphic Facebook communications between Miles and S.B. Deborah Davies testified as an expert witness on child sexual abuse accommodation, including patterns of delayed disclosure, incremental disclosure, false denials, memory, and grooming practices common to child sexual abuse. Unaware of the specific facts of the case, Davies merely offered general insight and did not explore any hypotheticals tied to the case.

Testifying in his defense, Miles denied any molestation took place. He disputed accounts given by S.B.'s relatives that they had confronted him following S.B. and K.M.'s disclosures. Miles had selective memory of his Facebook messages and denied ever speaking to S.B. in a sexual manner. During redirect, Miles suggested his Facebook account may have been hacked when the more graphic and explicit content was sent.

Central to Miles's theory were statements in S.B.'s childhood diary that nothing had occurred between the two. S.B. testified that those statements were untrue and meant to allay her father's suspicions in case he read her diary. And in later entries, S.B. was more candid about her contact with Miles.

The jury could not reach a verdict on counts 1 and 2 involving K.M. or the sexual intercourse charge involving S.B. in count 9. Those charges were later dismissed. It otherwise convicted Miles as charged, finding true the substantial sexual conduct allegations and multiple victim circumstances attached to counts 5 through 8 and 10.

At sentencing, the court expressed a tentative inclination to impose an aggregate term of 45 years-to-life, with consecutive 15-to-life terms on counts 3, 5, and 10 and concurrent 15-to-life terms on the remaining counts (counts 4, 6, 7, 8). It believed this sentence reflected the magnitude of Miles's crimes,

their impact on his young victims, and his failure to show remorse, while accounting for his minimal criminal history. The prosecutor, who had requested consecutive sentences on all seven counts (totaling 105 years-to-life), requested the addition of at least one consecutive 15-to-life term based on Miles's practice of grooming his young victims. Defense counsel replied that "any more than one 15-to-life enhancement is piling on" and "either a 15-to-life or a 30-to-life sentence" would suffice.

The court then confirmed its tentative, explaining:

> "My bottom line in coming up with the tentative was that [S.B.] was a victim over a prolonged period of time. She was the subject of what I consider, considering her age, unconscionable acts. And I cannot ignore the fact that [J.H.] was a separate victim. I can't simply just decide, 'Well, [J.H.] was just an add-on.' [J.H.] was also a victim of an unconscionable act."

Miles received 894 days of actual custody credit for his period of presentence custody (§ 2933, subd. (e)) and 134 days of conduct credit (§ 2933.1). Initially the court also imposed a $10,000 restitution fine (§ 1202.4), a suspended parole revocation fine in the same amount (§ 1202.45), and various fees. However, while this appeal was pending, the trial court granted Miles's request under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 to reduce the restitution fine to $300 and strike all remaining fees except the $80 security fee and $60 assessment fee.

DISCUSSION

Appointed counsel filed a brief summarizing the factual record and proceedings before the trial court. She presented no argument for reversal but asked us to review the entire record for error in accordance with *Wende, supra,* 25 Cal.3d 436. Pursuant to *Anders, supra,* 386 U.S. 738, counsel identified the following as issues that "might arguably support the appeal":

1. Whether there was sufficient evidence to bind Miles over at the preliminary hearing as to each count, and whether there was sufficient evidence to support the jury's verdicts on counts 3 through 8 particularly given S.B.'s denials in her diary.

2. Whether the convictions in counts 3 and 4 under section 288.7, subdivision (b) raise ex post facto concerns.

3. Whether admitting S.B.'s diary entries for prior consistent and inconsistent statements, or to show her state of mind, was an abuse of discretion.

4. Whether it was error to admit expert testimony regarding delayed disclosure.

5. Whether there was foundation to admit the Facebook entries attributed to Miles.

6. Whether the court erred in limiting the scope of inquiry regarding S.B.'s sexual history.

7. Whether it was error to overrule defense counsel's objection that S.B.'s direct examination testimony was cumulative in nature.

8. Whether the court properly instructed the jury.

9. Whether the court abused its discretion by relying on a multiple victim factor to impose consecutive indeterminate terms.

A review of the record pursuant to *Wende, supra,* 25 Cal.3d 436 and *Anders, supra,* 386 U.S. 738, including the issues referred to by appellate counsel, has disclosed no reasonably arguable appellate issue. Below, we briefly discuss in order the issues raised by counsel.

Testimony by K.M., S.B., and J.H. at the preliminary hearing readily supported the court's decision to bind Miles over. There was likewise ample

substantial evidence presented at trial to support each of Miles's convictions and true findings. S.B. testified that Miles touched her vagina during hide-and-seek games and placed his penis against her vagina while they swam in the pool. This touching began when S.B. was nine and continued until she moved to Oregon at the age of 13. S.B. claimed she falsely denied the abuse in her diary to allay her father's suspicions; the jury was entitled to believe her and reject Miles's theory that the diary denials were true. Supporting Miles's conviction in count 10, J.H. testified that Miles rubbed her vagina when she was 12 years old.

No ex post facto concerns are raised by the convictions on counts 3 and 4. Section 288.7, subdivision (b) took effect on September 20, 2006. (Stats. 2006, ch. 337 (Sen. Bill No. 1128), § 9, effective Sept. 20, 2006.) The amended information alleged that the conduct in counts 3 and 4 occurred "on or about and between September 21, 2006 and July 10, 2008." (Compare *People v. Riskin* (2006) 143 Cal.App.4th 234, 244–245 [one-strike term on forcible lewd act count violated federal and state ex post facto protections because the statute took effect five months *after* the beginning time frame alleged for that count].)

There was no error in admitting diary entries by S.B. that went to the heart of the defense case that S.B.'s testimony was fabricated. (See Evid. Code, §§ 770, 1235 [admissibility of prior inconsistent statements].) Responding to the defense inquiry, the prosecution properly introduced later diary entries that disclosed sexual contact with Miles. (See Evid. Code, §§ 791, subd. (b), 1236 [admissibility of prior consistent statements]; see *People v. Lopez* (2013) 56 Cal.4th 1028, 1067–1068 [victim's diary entry stating that defendant had stabbed and kidnapped her was admissible as a prior consistent statement].) Nor was there error in admitting various prior

statements in S.B.'s diaries for nonhearsay purposes, such as to prove her state of mind or explain her conduct. (See Evid. Code, § 1250, subd. (a); *People v. Melton* (1988) 44 Cal.3d 713, 739–740.)

During pretrial motions in limine, defense counsel argued that following the "Me Too" movement, there were no longer common misconceptions regarding delayed disclosure that would necessitate expert testimony. The court denied the motion. There was no error in admitting the expert testimony; foundation is present where "an issue has been raised as to the victim's credibility" based on the reporting delay. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744–1745.) Davies's testimony was limited in scope, describing general reporting patterns in child molestation cases without exploring the facts of this case or opining whether K.M., S.B., and J.H. were telling the truth. (See *People v. Bowker* (1988) 203 Cal.App.3d 385, 392; *People v. Julian* (2019) 34 Cal.App.5th 878, 885–886.)

Defense counsel objected that there was no foundation to prove that pornographic messages sent to S.B. from Miles's Facebook account were actually sent by Miles. The court overruled the objection, noting that foundation could be laid by S.B. There was no error; at trial, foundation for the Facebook evidence was indeed laid by S.B.'s testimony Miles likewise admitted sending the more innocuous messages to S.B., though he disclaimed sending the more incriminating content.

Before trial, defense counsel moved to admit evidence as to S.B.'s prior sexual history under Evidence Code section 782. In her diary, S.B. claimed to have lost her virginity to a boy named Sean in 2011. This was inconsistent with her claim that she had sexual intercourse with Miles before 2011. Likewise, her diaries contained a volume of private information about other sexual contact, arguably in tension with S.B.'s claim that she put false

information *about Miles* in her diary in case her father saw it. The court agreed that some of this evidence would be admissible under Evidence Code section 782, as it went to S.B.'s credibility. Following a hearing under Evidence Code section 782, the court permitted a general inquiry without naming specific boys or specific sexual acts done with those boys. Defense counsel did not object, and nor was there any error in the limitations imposed. (See *People v. Bautista* (2008) 163 Cal.App.4th 762, 781–783.)

During S.B.'s direct examination, the prosecution explored her Facebook conversations with Miles, including pornographic images sent to him. Midway through this inquiry, defense counsel objected that the questioning was becoming cumulative, but the objection was overruled. Trial judges have broad discretion to curb cumulative evidence. (Evid. Code, § 352; *People v. Robinson* (2020) 47 Cal.App.5th 1027, 1032.) Facebook messages between Miles and S.B. formed an important part of the prosecution case, and in his testimony Miles denied having sent or received the more explicit content. The evidence thus established foundation for the highly probative incriminating evidence and tended to undermine Miles's credibility. Nor was there any abuse of discretion in concluding that the probative value of these Facebook communications was not substantially outweighed by their prejudicial effect.

We turn next to the *Anders* issues concerning jury instructions. The jury was properly instructed on general principles of law connected to the case. (See *People v. Boyce* (2014) 59 Cal.4th 672, 715.) A unanimity instruction was properly provided on defense counsel's request. (CALCRIM No. 3501; see *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) There was no error in instructing jurors under CALCRIM No. 1191B that proof of a charged sexual offense beyond a reasonable doubt could establish the

defendant's propensity to commit another sexual offense that was charged in the same case. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1160–1161, 1167–1168.) There was no sua sponte duty to instruct on a lesser included offense because the evidence showed either that Miles was guilty as charged or not guilty of any crime. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; accord *People v. Gutierrez* (2009) 45 Cal.4th 789, 825–826.) Nor was there error in the instruction on substantial sexual conduct (CALCRIM No. 1120), which mirrors the statutory definition. (§ 1203.066, subd. (b).)[2]

Turning to sentencing issues, counsel probes whether the trial court erred in relying on the same multiple victim factor to both enhance Miles's sentences in counts 5 and 10 under the One Strike Law and to impose consecutive terms on those counts. Because Rule 4.425 of the California Rules of Court does not restrict a trial court's discretion to impose consecutive *indeterminate* terms, there was no error. (*People v. Arviso* (1988) 201 Cal.App.3d 1055, 1058; *People v. Murray* (1990) 225 Cal.App.3d 734, 750; compare § 1170, subd. (b) [dual use of facts is statutorily proscribed in determinate sentencing].)

In sum, a review of the entire record pursuant to *Wende, supra*, 25 Cal.3d 436 and *Anders, supra*, 386 U.S. 738, including the issues referred to by appellate counsel, has disclosed no reasonably arguable appellate issues. Miles has been adequately represented by counsel on this appeal.

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2 " 'Substantial sexual conduct' " is statutorily defined as "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." (§ 1203.066, subd. (b).)

DISPOSITION

The judgment is affirmed.

DATO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.